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May 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: September 25th, 2004
Case No.: TIA-0229

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a maintenance welder at the Paducah Gaseous Diffusion Plant (the plant). In his application, he stated that he worked at the plant for approximately four months -- from June 1976 to October 1976. He requested physician panel review of two illnesses -- asbestosis and colitis. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on all illnesses. The Panel stated that the Applicant's asbestosis arose out of his 20 years of work as a boilermaker. Further, the Panel stated that the Applicant's period of exposure at the plant was not significant enough to contribute to his condition of asbestosis or his colitis.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant challenges the Panel's determination on his asbestosis. He claims that asbestos-related conditions can arise out of periods of exposure as brief as one or two months.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The record lends support to the Applicant's argument that exposure at the site was a significant factor in aggravating, contributing to, or causing his asbestosis. The record contains a letter from Dr. Steven Markowitz, a physician in the Former Worker Program. The letter discusses the results of the Applicant's medical examination and states:

The chest x-ray finding of some irregular opacities is consistent with the diagnosis of asbestosis of the lungs. The asbestosis was caused by occupational exposure to asbestos, including the exposure that you had at the gaseous diffusion plant. . . .

Record at 25 (emphasis added). Given Dr. Markowitz's statement that the cause of the Applicant's asbestosis included his exposure at the plant, it was incumbent upon the Panel to explain the basis of its contrary finding. Accordingly, the application should receive further consideration.

In compliance with Subpart E, the application will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the application under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0229 be, and hereby is, granted.
- (2) The Physician Panel Report did not adequately explain the basis of its determination. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 13, 2005